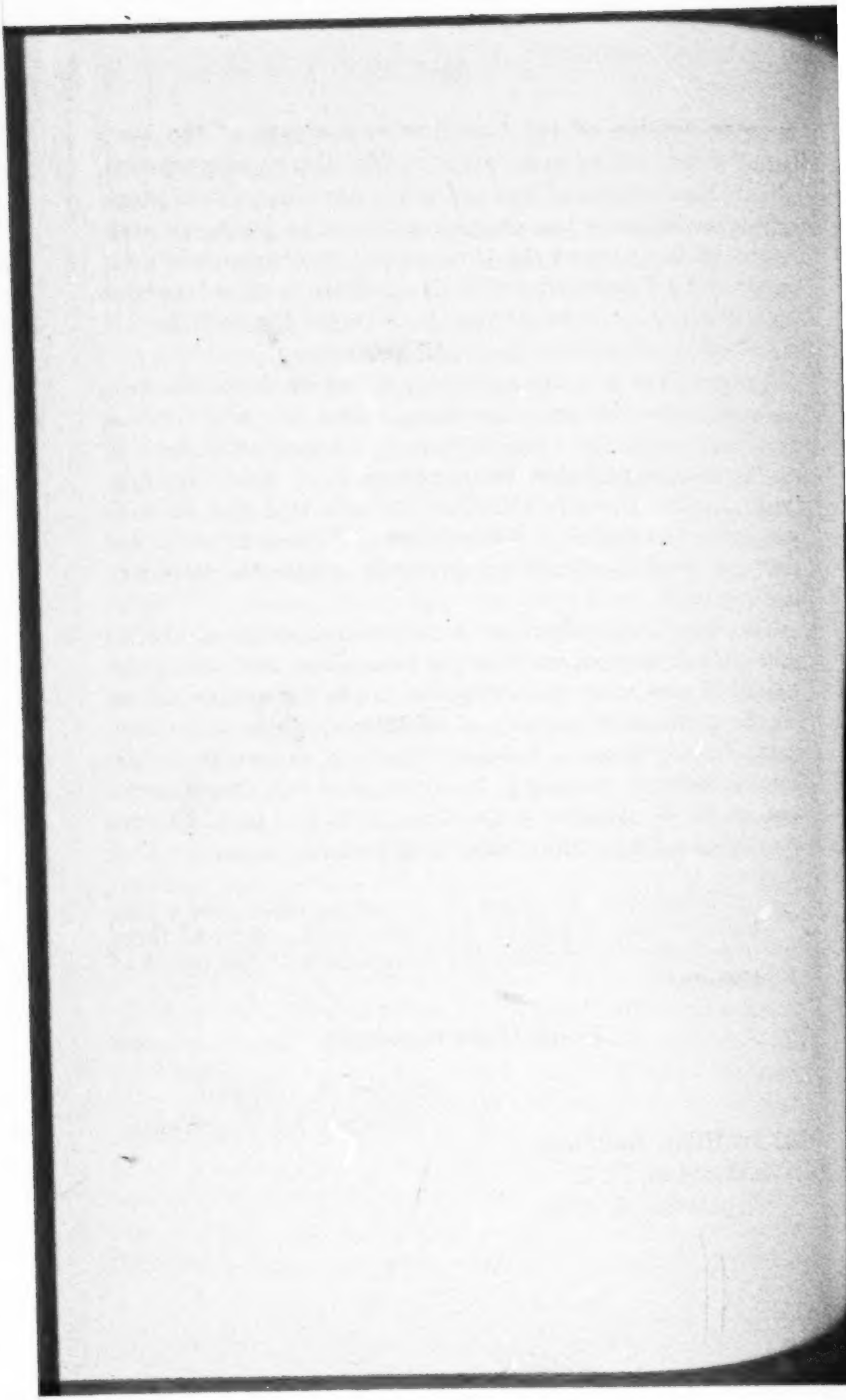

FILED OCT 3
OCT 3
WM. R. STAN

THE SMITH PRESS, TRENTON, N. J.

In the

Supreme Court of the United States

OCTOBER TERM, 1925

No. ~~113~~ 17.

NORTH GERMAN LLOYD, APPELLANT,

versus

THE UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM COURT OF CLAIMS

Compensation for Temporary Use and Occupation of North German Lloyd Piers at Hoboken

---

No. ~~114~~ 18

NORTH GERMAN LLOYD, APPELLANT,

versus

THE UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM COURT OF CLAIMS

Compensation for Personal Property of North German Lloyd located on Hoboken Piers and taken over by the United States

---

BRIEF FOR APPELLANT

EDGAR W. HUNT,
Counsel for Appellant

FOREWORD

In April, 1917 the United States, giving written notice that it was acting by authority of the Act of August 29, 1916, 39 Stats. 645, took possession of the North German Lloyd piers at Hoboken. In 1918 it acquired title to the piers by proceedings of the character of eminent domain. In No. 112 compensation is sought for the use of the piers during the period preceding the completion of the proceedings that produced the change of title.

On the piers was personal property belonging to the North German Lloyd, which the United States also took unto itself in possession and title. In No. 113 compensation is sought for the value of this personal property.

SUBJECT INDEX

	PAGE
Foreword—Fly Leaf	
Opinions Below	2
Grounds on which Jurisdiction is Invoked	2
Cases believed to sustain Jurisdiction	4
Statement of Case	4
Resume of Petition in No. 112	5
Resume of Petition in No. 113	7
Writings given by U. S. in Connection with the Takings	8
Specification of Errors	14
Summary of Argument	14
Argument	15
Extension of argument under six points:	
(1) Enemy property found upon land in United States, cannot be condemned as enemy property, without an Act of Congress	15
(2) No Act of Congress purports to subject the property, the taking of which gives rise to this suit, to any different treatment than that accorded to property in general under our Constitution and laws, nor to deprive its owner of any rights in respect to it enjoyed by property owners in general	17
(3) The manner of taking created an implied contract. The claimant, altho alien, is entitled to sue in the Court of Claims	18
(4) Award for property expropriated under Proclamation of June 28, 1918, does not include compensation for the use of property taken prior to such expropriation	21

PAGE

(5) Additional basis of liability is asserted in case No. 113, namely, express contract arising from the Memorandum of June 26, 1918, (R. 6, Par. e, et seq) 26

(6) Contended that an affirmance of the decision of the Court of Claims in these cases will in effect overrule Brown v. U. S., 8 Cranch 110 28

TABLE OF CASES CITED

Abbott ads. Hanger, 73. U. S. 532 16
Brigham v. Edmands, 7 Red. (Mass.) 359 26
Brown v. U. S. 8 Cranch, 110 ....4, 15, 16, 18, 20, 28
Browne ads. Lamar, 92 U. S. 187 16
Buffalo Pitts Co. ads.U. S. 234 U. S. 228 4
Campbell v. U. S., 266 U. S., 368 (decided Dec. 8, 1924) 4, 18, 19, 26
Chemical Foundation ads. U. S., (1924) 294 Fed. 300 ..... 17, 20
Davis ads. duPont de Nemours & Co., 264 U. S. 456 18
Deutsch - Australische Dampschiffs - Gesellschaft Case, No. C-576, decided March 17, 1924, 59 Ct. Cls. 450 2
Duckett, A. W. & Co., Inc. v. U. S. 266 U. S. 149, (decided Nov. 17, 1924).... 4, 18, 19, 25, 27
duPont de Nemours & Co. v. Davies, 264 U. S. 456 18
Edmands ads. Brigham, 7 Red. (Mass.) 359 26
Great Falls Mfg. Co., ads U. S., 112 U. S. 645 ....4, 26
Hanger v. Abbott, 73 U. S. 532 16
Hepburn v. Jersey City (1901), 67 N. J. L. 114, (affirmed Ibid, 686) 25
Herrera Nephews v. U. S., 222 U. S. 558 16
Jersey City ads. Hepburn (1901), 67 N. J. L. 114 (affirmed Ibid 686) 25

PAGE

Johnson's Case, 2 Ct. Cls. 319 26
Juragua Iron Co. v. U. S., 212 U. S. 297 16
Klein's Case, 13 Wall. 128 16
Lamar v. Browne, 92 U. S. 187 16
Lane ads. U. S. (1869), 8 Wall 185 27
Lynah ads. U. S., 188 U. S. 445 ..... 4, 26
Miller v. U. S., 11 Wall. 268 16
Monongahela Nav. Co. v. U. S., 148 U. S. 312 ..... 4, 20, 26
North American Trading & Trans Co. ads. U. S., 253 U. S. 330 ..... 4, 26
Omnia Commercial Co. v. U. S., 261 U. S. 502 17
Ribas y Hijo v. U. S., 194 U. S. 315 16
Seaboard Air Line Rwy. Co. v. U. S., 261 U. S. 299 ..... 4, 26
U. S. v. Buffalo Pitts Co., 234 U. S. 228 4
U. S. ads. Brown, 8 Cranch, 110..4, 15, 16, 18, 20, 28
U. S. ads. Campbell, 266 U. S. 368 ..... 4, 18, 19, 26
U. S. v. Chemical Foundation (1924), 294 Fed. 300. ..... 17, 20
U. S. ads. A. W. Duckett & Co., Inc. 266 U. S. 149 (decided Nov. 17, 1924) 4, 18, 19, 25, 27
U. S. v. Great Falls Mfg. Co., 112 U. S. 645 ..... 4, 26
U. S. ads. Herrera Nephews, 222 U. S. 558 16
U. S. ads. Juragua Iron Co., 212 U. S. 297 16
U. S. v. Lane (1869), 8 Wall. 185 27
U. S. v. Lynah, 188 U. S. 445 ..... 4, 26
U. S. ads. Miller, 11 Wall. 268 16
U. S. ads Monongahela Nav. Co., 148 U. S. 312 ..... 4, 20, 26
U. S. v. North American Trading & Trans. Co. 253 U. S. 330 ..... 4, 26
U. S. ads. Omnia Commercial Co., 261 U. S. 502 17
U. S. ads. Ribas y Hijo, 194 U. S. 315 16
U. S. ads. Seaboard Air Line Rwy. Co., 261 U. S. 299 ..... 4, 26
Western Maid, The, 257 U. S. 419 20

PAGE

TABLE OF STATUTES CITED

Statutes at Large:

36 Stat. 1136 (Judicial Code, Sec. 145) 14, 28
36 Stat. 1139 (Judicial Code, Sec. 155) 20
36 Stat. 1157 (Secs. 242, 243 Judicial Code) .. 3
39 Stat. 215 19
39 Stat. 645 (Act of August 29, 1916) 2, 3, 5, 6, 7, 9, 11, 17, 26
40 Stat. 241 19
40 Stat. 411 (Trading with Enemy Act.) 17
40 Stat. 458 ..... 2, 21
40 Stat. 459 ..... 6, 21
40 Stat. 518 19
40 Stat. 1804 (President's Proclamation of June 28, 1918) 2, 21, 22
40 Stat. 1914 (President's Proclamation of Dec. 3, 1918) 2, 21, 23
42 Stat. Part I, 105 29

In the

Supreme Court of the United States

OCTOBER TERM, 1925

No. 112.

NORTH GERMAN LLOYD, APPELLANT,

versus

THE UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM COURT OF CLAIMS

Compensation for Temporary Use and Occupation of North German Lloyd Piers at Hoboken

---

No. 113.

NORTH GERMAN LLOYD, APPELLANT,

versus

THE UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM COURT OF CLAIMS

Compensation for Personal Property of North German Lloyd located on Hoboken Piers and taken over by the United States

---

BRIEF FOR APPELLANT

(It is believed that the Court's convenience will be served by these two cases being presented in one brief, and in subordination to Case No. 114 of this Term, between the same parties, in which the fundamental principles underlying all three cases are discussed at length, with a full citation of authorities.)

THE OPINIONS BELOW

In each case the Court of Claims filed only a short Memorandum, (R. No. 112, p. 5; R. No. 113, p. 7), holding that it lacked jurisdiction, and referring for its reasoning to its opinion in *Deutsch-Australische Dampfschiffs-Gesellschaft* case, printed in full in R. No. 112, p. 6 and R. No. 113, p. 8.

The Memorandum in No. 112 also referred to the Act of March 28, 1918, 40 Stats. 458, and to Proclamations issued by the President under dates of June 28, 1918 (40 Stats. 1804) and December 3, 1918 (40 Stats. 1914). For reasons to be stated later (infra Point IV) the authorities thus referred to are deemed by appellant to be irrelevant.

Grounds on which the jurisdiction is invoked

These appeals seek reversal of judgments entered in the Court of Claims, sustaining demurrers to the Petitions in the two cases.

Both judgments under review were entered in the Court of Claims on March 17, 1924 (R. No. 112, p. 5; R. No. 113, p. 7).

The claims advanced by appellant in the Court below were as follows:

In No. 112

That by virtue of the Constitution, the Act of Congress of August 29, 1916, 39 Stats. 645 (same Act under which Government operation of the railroads was later undertaken), and implied contract, the United States was obliged to pay appellant the reasonable value of the use of the North German Lloyd piers at Hoboken, on a per diem basis, for the period April 6, 1917 to December 3, 1918; and that appellant had a right to recover the same by suit in the

Court of Claims, under Sections 145 and 155 of the Judicial Code. (For reasons that will appear in the statement, a claim is made, in the alternative, for compensation for the use during the period June 28—December 3, 1918, measured by another standard, if it shall be held that the asserted per diem rate is not the proper measure of compensation for that period.)

In No. 113

That, upon the same grounds as in No. 112 and upon the additional ground of express contract, afforded by a certain memorandum signed by representatives of the United States and those of appellant, the United States was obliged to pay for certain personal property, located on said piers, and the title to and possession of which was taken by the United States under authority of said Act of August 29, 1916 (39 Stats. 645); and that appellant had a right to recover for the same by suit in the Court of Claims, under Sections 145 and 155 of the Judicial Code.

The United States in both cases demurred on the ground that the petition "does not state a cause of action against the United States" (R. No. 112, p. 5; R. No. 113, p. 7).

In both cases the Court of Claims sustained the Demurrer solely on the ground that it did not have jurisdiction (R. No. 112, p. 5; R. No. 113, p. 7). This, it is believed, resulted from an erroneous view of the law.

In both cases appeal was applied for on June 3, 1924 and allowed on June 16, 1924 (R. No. 112, p. 13; R. No. 113, p. 15). The appeals were taken pursuant to Sections 242 and 243 of the Judicial Code (36 Stats. 1157) as the same then stood.

In both actions jurisdiction is believed to be sustained by the following cases: *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312; *U. S. v. Great Falls Mfg. Co.*, 112 U. S. 645; *U. S. v. Lynah*, 188 U. S. 445; *U. S. v. Buffalo Pitts Co.*, 234 U. S. 228; *U. S. v. North American Trans. & Trading Co.*, 253 U. S. 330; *Seaboard Air Line Rwy. Co. v. U. S.*, 261 U. S. 299; *A. W. Duckett & Co., Inc. v. U. S.*, 266 U. S. 149; *Campbell v. U. S.*, 266 U. S. 368.

In the argument it is endeavored to show that the decisions just cited, although evoked by cases which involved only the rights of citizens, are applicable and controlling in the present suits, notwithstanding appellant was an alien enemy at the time its property was taken. The fundamental question in the cases relates to the rights of aliens, in respect of their private property situated here, upon the outbreak of war between their country and ours; and numerous authorities,—the most important being *Brown v. U. S.*, 8 Cranch 110,—are cited to sustain the view that, at least in the absence of an Act of Congress to the contrary, their rights are in this respect the same as those of a citizen.

STATEMENT

These are appeals from two judgments of the Court of Claims sustaining demurrers to the petitions solely on the ground that the Court lacked jurisdiction to entertain the suits. Fundamentally, both cases involve the same question presented in No. 114 of this Term between the same parties, namely, whether the alien enemy owners of property situate in the United States which, during the late war, was taken for public use under statutes (earlier in date than the Trading with the Enemy Act) that ex-

tended to the property of citizen and enemy alike, and that entitle citizens to compensation for property taken, has a right, now that peace is restored, to maintain an action for compensation in the Court of Claims.

In No. 112 compensation is sought for the use and occupation by the United States of appellant's piers at Hoboken from April 6, 1917 to December 3, 1918.

In No. 113 compensation is sought for personal property belonging to appellant and located on said piers, which the United States took over in possession and title at the time that it entered into occupation of the piers, or subsequently.

In entering into the occupation of the piers, and in taking over the personal property, the United States asserted, in writings given to appellant, that it was acting pursuant to the authority of the Act of Congress of August 29, 1916, (39 Stats. 645), reading as follows:

> "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same to the exclusion, as far as may be necessary, of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

THE PETITION IN NO. 112

This sets forth facts which may be summarized as follows:

Appellant is a corporation of Germany, whose Government accords to American citizens the right

to sue it in its courts. During the period 1857-1900 appellant purchased various adjoining tracts of land on the Hudson River at Hoboken and built piers thereon and used the same as a terminal for its steamers in the Port of New York. In 1900 its piers were entirely destroyed by fire, and as a business convenience in financing the rebuilding, appellant caused to be organized a New Jersey corporation, called the North German Lloyd Dock Co., all of whose shares (except three to qualify directors) were owned by appellant and to which appellant conveyed all its lands in Hoboken. Thereafter appellant caused said New Jersey corporation to erect on said lands three large piers, a bulkhead building and other structures, provided with appropriate fixtures, the whole constituting a complete and fully equipped steamship terminal.

By lease dated March 20, 1903 the New Jersey corporation demised the entire premises to the appellant for a term of 999 years, and appellant at once entered into possession under the lease. On April 6, 1917, the premises, still being in the possession of appellant as lessee, were entered upon by the United States, acting through the War Department, and troops were quartered on the piers but appellant was not excluded.

On April 20, 1917 the United States took exclusive possession, under 39 Stats. 645, and removed all of appellant's representatives.

On June 28, 1918 title to the premises was acquired by the United States, pursuant to the authority of the Act of March 28, 1918 (40 Stats. 459), and on December 3, 1918 the United States awarded, (it has never paid, but that is immaterial here), compensation for the value of the property thus

expropriated; but has not awarded or paid any compensation for the use of the premises prior to the expropriation and change of title.

Claim is made for the reasonable value of the use on a *per diem* basis for the period April 6, 1917 to December 3, 1918. In respect of the period June 28 to December 3, 1918 (after change of title but before the award of compensation) it is claimed, in the alternative, that if compensation on the basis of a *per diem* rate is not allowed there should be an allowance measured by legal interest on the value as fixed by the award.

The Petition alleges the suit to be founded upon the Constitution, the Act of August 29, 1916 (39 Stats. 645), implied contract, and a claim, not sounding in tort, for unliquidated damages for the reasonable value of the use and occupation.

The jurisdictional averments are made that no action on the claim has been had in Congress; that appellant is the owner of this claim; that no assignment of the claim has been made; that no suits are pending in any other court based upon the facts here involved against any person who was, in respect thereto, acting in behalf of the United States, and that the suit is brought within six years after the claim first accrued.

THE PETITION IN NO. 113

This is, in all respects, like that in No. 112, except that it describes the personal property said to have been "taken out of the possession and ownership of claimant and into the possession and ownership of the United States of America" in six categories, each of which is separately valued. The values stated are alleged to be, in some categories

those fixed by the United States, in other categories those fixed by the United States and the representatives of appellant acting jointly, and in still other categories those fixed by appellant acting alone. There is also set forth a memorandum respecting the property comprised in the first five categories, signed by the representatives of the United States and of appellant. The suit is stated to be founded on the same bases as are named in No. 112, and in addition is said to rest upon express contract with the Government, evidenced by the memorandum just referred to.

WRITINGS GIVEN BY THE UNITED STATES IN CONNECTION WITH THE TAKINGS

As regards Case No. 112, there was served on appellant's representative, on April 17, 1917, the following notice:

"WAR DEPARTMENT

Office of the Depot Quartermaster,

612 New York City, April 17, 1917.

From: Depot Quartermaster, New York, N. Y.

To: Mr. Charles von Helmolt, President, The North German Lloyd Dock Company, 5 Broadway, New York, N. Y.

Subject: U. S. taking possession of North German Lloyd Dock Company's property in Hoboken, N. J.

1. In confirmation of the notice served upon you orally on the afternoon of April 16, 1917, you are informed that, by direction of the President of the United States, and under

authority of the Act of Congress of August 29, 1916 (39 Stat. 645), I hereby take possession and assume control,—for the purposes stated in the said Act of Congress, as embodied in letter from the Secretary of War, dated April 16, 1917, copy herewith, and will utilize the same to the exclusion of all other traffic,—of the following property of the North German Lloyd Dock Company, Inc., of New Jersey, situated in Hoboken, New Jersey, United States of America, viz.:

> 'All the land and water front, including the piers, sheds thereon, bulkhead building and all other buildings and improvements thereon, and all movable property used in connection with the operation of the piers and the handling of shipping, owned by the North German Lloyd Dock Company, Inc., of New Jersey, situated in the City of Hoboken, New Jersey, bounded on the west by River Street, on the north by Fourth Street and the property of the Holland America Line, on the east to and including the modified pierhead line in the Hudson River, approved by the Secretary of War March 1, 1913, and on the south by the northerly limits of the property of the Hamburg-American Line Terminal and Navigation Company.'

2. You are hereby directed to have made a careful and accurate inventory of all movable property on the premises referred to above, for the use of the undersigned in connection with the checking and examination of such movable property; and to have removed from said premises, or to have stored thereon as may be approved by the undersigned, any

private property or merchandise that may be at present temporarily stored thereon.

3. The turnover of the above named property, fixed and movable, and the removal of privately owned property and merchandise, to be completed not later than 12 o'clock noon of April 23, 1917.

4. You will also cause to be removed from said premises all employees of the North German Lloyd Steamship Company or of the North German Lloyd Dock Company, who may now be residing or at work within the limits of said premises, in accordance with the terms of the notice given to you orally on the afternoon of April 16, 1917, same to be completed by noon of April 23, 1917, except in the cases of such special employees as may be approved by the undersigned, and where such delay is in the interests of the United States Government and the North German Lloyd Dock Company.

5. Enclosed herewith is a copy of the instructions of the Secretary of War, which is furnished for your information and that of the owners of the property, as per instructions in that letter.

6. Please acknowledge receipt.

(Sgd) J. M. Carson,
Colonel, Q. M. Corps.

1 enclosure
LMO—JMC"

Attached thereto was a letter of instruction from the Secretary of War to the Depot Quartermaster, reading as follows:

"WAR DEPARTMENT

Washington, April 16, 1917.

The Depot Quartermaster,
New York, N, Y.

(Through the Quartermaster General)

Sir:

Under authority of the Act of Congress of August 29, 1916 (39 Stat. 645), providing that:

'The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable,'

the President directs that you take possession and assume control, for the purposes stated in the said Act of Congress, quoted above, and to utilize the same to the exclusion of all other traffic, of the following property in Hoboken, New Jersey:

The Hamburg-American Piers and the North German Lloyd Piers and the lands and buildings appertaining to said piers, which property is more particularly indicated and described in the map annexed hereto.

You will notify the persons now in possession of the said property, and the owners thereof, if known, of the contents of this order, and furnish them copies of the same.

(Sgd.) Newton D. Baker,
Secretary of War."

In regard to Case No. 113, there was signed by representatives of the United States and of appellant the following memorandum referring to the property comprised in the first five categories set forth in the Petition in this case:

> "At a meeting held at the office of The New York Trust Company, at No. 26 Broad Street, New York City, on June 26, 1918, at ten a. m., at which were present Mr. Frank E. Williamson, representing the North German Lloyd; Mr. G. Friedrichs, former Chief Dock Clerk, of the North German Lloyd; Messrs. Otto T. Bannard, Morgan M. Mann and Gilbert S. McClintock, representing the Alien Property Custodian; Col. A. C. Blunt, U. S. A.; Col. F. H. Schoeffel, U. S. A., and Paymaster J. Lyman Pratt, U. S. Navy, comprising the joint Board of the War and Navy Departments respectively, and Captain Lawson Sandford, Asst. to the General Superintendent, Army Transport Service, New York, there was submitted an inventory showing the quantities and articles of movable property, material, gear and supplies owned by the North German Lloyd, for which the Army is considered responsible, as a result of the selections by the Appraisers for the Army in April and May, 1917. This was marked for identification by Mr. Bannard, Col. Blunt, Paymaster Pratt and Mr. Friedrichs.
>
> There was added to this inventory similarly marked for identification, a group of North German Lloyd property of similar type, which the Appraisers had not recommended in April and May, 1917, but which was retained in Army possession, and is recommended to be incorporated as a part of the inventory aforesaid.

To complete the responsibility and record of the Army, there was also added for record certain items of office furniture which the Army subsequently acquired from the North German Lloyd, likewise similarly marked for identification.

The three groups shall be combined, written out and shall constitute the official inventory and record of all the movable property of the North German Lloyd in the hands of and chargeable to the War Department at its Hoboken Piers on April 17, 1917, and shall be executed by the representatives of the several interests concerned. This procedure was agreed to by all present, and the question of values was not raised.

Separate and apart from this settlement is involved the determination of responsibility for certain miscellaneous property of the North German Lloyd (mainly ex ships) reposing on April 17, 1917, in certain rooms on the upper deck of the bulkhead building. The matter is under adjustment in respect to the present location and identification of this miscellaneous property, and if it is not accounted for, or turned over to Mr. Bannard, Alien Property Custodian, to his satisfaction, the Joint Army and Navy Board, hereby decide to recommend to the War Department that the responsibility rests upon the War Department. To establish the record a special supplement to the main inventory determined above shall be written and executed forthwith in similar manner.

It is agreed that the North German Lloyd and not the North German Lloyd Dock Com-

pany was the owner of all the property referred to.

(Sgd.)

Otto T. Bannard, for Alien Property Custodian.

A. C. Blunt, Lt. Col. U. S. A. for U. S. Army.

Frank E. Williamson, Attorney for North German Lloyd."

Specification of Errors

The error complained of is that the Court of Claims held that it was without jurisdiction to hear and determine appellant's claims, whereas it should have held that it had jurisdiction under Sec. 145 of the Judicial Code. (36 Stats. 1136).

Summary of Appellant's Argument

Enemy private property found here at the commencement of war cannot be confiscated unless an Act of Congress authorizes it. In these cases there was no such Act. The taking of the property for public use under a pre-war statute that applied generally to all property within the territorial jurisdiction entitled the owner to compensation. Now that peace is restored an action may be maintained under Sec. 145 of the Judicial Code (the benefit of which is given to this appellant, although an alien, by Sec. 155) to have the amount of the compensation determined.

An award made (not paid) when the fee of the pier property was acquired by the United States in

1918 did not include the claim involved in No. 112, and does not bar suit.

An affirmance of the judgments below would overrule *Brown v. U. S.*, 8 Cr. 110. In effect, it would work a confiscation not authorized by statute, and therefore would infringe upon a field which, under the Constitution, belongs exclusively to Congress.

ARGUMENT

I

The property involved in these suits was taken for public use, by express direction of the President, who declaredly acted in pursuance of a statute passed eight months before the commencement of the war, and which does not mention confiscation.

In *Brown v. U. S.*, 8 Cranch 110, this Court was called upon to determine the rights of the owners of "property found on land at the commencement of hostilities" and belonging to a subject of the enemy. This is such a case.

In the case cited the U. S. Attorney sought, by libel filed in the District Court, to procure a decree condemning certain property as enemy property forfeited to the United States. It was decided that such property might *not* "be seized and condemned as a necessary consequence of the declaration of war;" and that proceedings to condemn it "can be sustained only upon the principle that they are instituted in execution of some existing law." (8 Cranch at p. 123). The Court also remarked that "It is urged that in executing the laws of war the Executive may seize and the Courts condemn all property which according to the modern law of nations is subject to confiscation * * *", and in reply to this said: "This position is not allowed."

The general doctrine of the case is that Congress *may* authorize the confiscation of such property, but that unless Congress does so, it is immune from confiscation. The case seems fairly to warrant the assertion that a subject of the enemy owning property located in our territory, and outside the theatre of war or of hostile operations, is not to be treated, in respect of such property, in any different manner than a citizen, unless Congress authorizes different treatment. From this it would logically follow that unless Congress has shown an intention to the contrary, the taking of such property by the Government for public use gives the owner the same right to be compensated as would be his if he were a citizen. (Of course his right to sue is suspended while war continues, but it revives with the restoration of peace. *Hanger v. Abbott,* 73 U. S. 532).

No case analogous to these has come before this Court since the decision in *Brown v. U. S.,* supra. The Civil and Spanish War cases presented questions not analogous, because some of them (e.g., *Miller v. U. S.,* 11 Wall. 268) arose under statutes that expressly authorized the confiscation of property intended to be used to aid the Rebellion, and property belonging to rebels; and others (e.g., *Klein's Case,* 13 Wall. 128; *Lamar v. Browne,* 92 U. S. 187; *Ribas y Hijo v. U. S.,* 194 U. S. 315; *Juragua Iron Co. v. U. S.,* 212 U. S. 297; and *Herrera Nephews v. U. S.,* 222 U. S. 558) related to property captured by military forces in the course of hostile operations in enemy territory. *Juragua Iron Co. v. U. S.* is distinguishable on the further ground that the property involved was not *taken* for public use, but injured or destroyed by a lawful action without a taking—in which case no

liability arises (*Omnia Commercial Co. v. U. S.*, 261 U. S. 502, and cases therein cited).

The most recent expression of judicial opinion on the fundamental question now presented is that of Judge Morris in the U. S. District Court for Delaware in *U. S. v. Chemical Foundation* (1924) 294 Fed. 300. He said:

> "Enemy property found upon land in the United States cannot be condemned as enemy property without an act of Congress. The declaration of war is not such an act."

Unless, however, the decision below is reversed, that which our Courts have thus for more than a hundred years said could not be done, is done by the simple expedient of closing the doors of courts of justice, for no other reason than that the owner of the property, for the taking of which compensation is sought, was an enemy at the time it was taken.

II

No Act of Congress purports to subject the property, the taking of which gives rise to these suits, to any different treatment than that accorded to property in general under our Constitution and laws, nor to deprive its owner of any rights in respect to it enjoyed by property owners in general. The taking occurred prior to the Trading with the Enemy Act 40 Stat. 411, (approved October 6, 1917) and was expressly based upon the Act of August 29, 1916 (39 Stats. 645).

The President did not assume the property to be subject to extraordinary measures on account of its ownership, for in taking over, in No. 112 the possession and use, and in No. 113 the ownership, he

invoked as the source of his authority the Act of Congress just cited, under which, at later dates, the property of citizens was acquired for like purposes —for instance, the railroads taken into Government possession and control in December, 1917, and the pier property known as the Bush Terminal in Brooklyn involved in *A. W. Duckett & Co., Inc. v. U. S.*, 266 U. S. 149, (decided Nov. 17, 1924). Of course, the taking was a "war measure", but only in the sense that the taking over of the railroads was, concerning which this Court said, in *duPont de Nemours & Co. v. Davis*, 264 U. S. 456 (at p. 462):

> "In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity, as a war measure, 'under a right in the nature of eminent domain.'"

Nothing in the Act of Congress, in the President's directions, in the instructions of the Secretary of War to the Depot Quartermaster, or in his notice to appellant's agent, indicates that the taking of the property involved in either of these cases was intended as an exercise of war powers against enemy property. On the contrary, they expressly negative such a theory. (See, supra, "Writings given by the United States in connection with the takings.") Had the executive officials mentioned—even the highest of them—desired to give the takings such a character, they would have been powerless to do so, in view of the *Brown* case, for lack of statutory authorization.

III

In *Campbell v. U. S.*, 266 U. S. 368, decided December 8, 1924, in the words of this Court:

> "An officer of the army, acting under the direction of the Secretary of War, and without obtaining plaintiff's consent or instituting condemnation proceedings or making any compensation therefor, took possession of a part of plaintiff's land * * *"

Pointing out that under the Acts of June 3, 1916 (39 Stats. 215) and July 2, 1917 (40 Stats. 241) as amended April 11, 1918 (40 Stats. 518), the President and Secretary of War were authorized to purchase or condemn the lands, the Court declared that "the taking was under the sovereign power of eminent domain", and entitled the owners to recover.

Thus this Court held that a mere taking, when authorized by a statute, gives rise to a right of compensation, although no words are uttered to explain the intent of the taking or lend aid to the presumption of an implied contract to pay.

In the *Duckett* case (supra), decided a few weeks prior to the *Campbell* case, the Court apparently preferred not to pass on the effect of a mere taking, without words to show its character, for it said:

> *"Whatever the effect of the taking,* there was a contract implied in fact by the President's order, and there is no doubt concerning the jurisdiction of the Court of Claims." (Italics counsel's).

The only part of the President's order from which an implied contract could thus be said to arise was this: "Steps will be promptly taken to ascertain the fair compensation to be paid for the temporary use by the Government of the premises". It cannot be doubted, especially since the decision in the *Campbell* case, supra, that without these words the same

result would have been reached. In fact, *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312, forbids any other result, for in that case a property owner was held entitled to compensation for property (a franchise) for which an Act of Congress had expressly directed that no compensation should be allowed. The Court found that the Constitution rendered such a direction nugatory.

Appellant, therefore, is clearly entitled to be compensated unless it can be held that its alien enemy status, *ipso facto*, deprived it of property rights in respect of property situated in our territory and outside the theatre of war. This, as has been stated, seems to run contrary to *Brown v. U. S.* and to what was said by the District Court in *U. S. v. Chemical Foundation*, supra.

The Court below evidently thought that a distinction was to be observed between a right to be compensated and a right to sue. But since the plaintiff is no longer an enemy, but a friendly alien, whose Government allows Americans to sue it in its Courts (Petition, both cases, Par. 1 & 2) Sec. 155 of the Judicial Code* (36 Stat. 1139), seems to bar the drawing of such a distinction. If plaintiff has a *right* to be compensated, the Court of Claims is the forum in which to prosecute it. Before Congress plaintiff could not assert rights, but only plead for grace and favor.

The reasoning of this Court in *The Western Maid*,

---

*"Aliens who are citizens or subjects of any Government which accords to citizens of the United States the right to prosecute claims against such Government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction."

257 U. S. 419, seems, by analogy, to deny the existence of such a distinction as the Court below sought to draw. In the case cited this Court reasoned that since the United States could not be held legally liable for a tort, it could not, in a legal sense, commit a tort. By parity of reasoning, if the appellant in this case cannot be denied a right to compensation, it cannot be denied a right to sue for compensation, since by Section 145 of the Judicial Code sovereign immunity from suit is waived, and by Section 155 the appellant, although an alien, is entitled to sue in the Court of Claims.

IV

In its Memorandum in No. 112 (Record, p. 5), the Court of Claims referred to the Act of March 28, 1918 (40 Stats. 458) and the President's Proclamations of June 28, 1918 (Ibid, 1804) and December 3, 1918 (Ibid, 1914) by means of which the title to the pier property was divested from the former owners (both lessor and lessee) and vested in the United States. Presumably the Court below intended by this reference to suggest that the award made (but never paid) in favor of appellant, in connection with this change of title, included a sum representing compensation for the period of temporary use prior to the change in title. A study of the documents mentioned, however, indicates that such a conclusion is not warranted. The Act of March 28, 1918 (40 Stats. 459) reads as follows:

> "The President is authorized to acquire the title to the docks, piers, warehouses, wharves, and terminal equipment and facilities on the Hudson River now owned by the North German Lloyd Dock Company and the Hamburg-

American Line Terminal and Navigation Company, two corporations of the State of New Jersey, if he shall deem it necessary for the national security and defense: Provided, That if such property can not be procured by purchase, then the President is authorized and empowered to take over for the United States the immediate possession and title thereof. If any such property shall be taken over as aforesaid, the United States shall make just compensation therefor to be determined by the President. Upon the taking over of said property by the President, as aforesaid, the title to all such property so taken over shall immediately vest in the United States: Provided Further, That section three hundred and fifty-five of the Revised Statutes of the United States shall not apply to any expenditures herein or hereafter authorized in connection with the property acquired."

The President's Proclamation of June 28, 1918 was in form as follows:

"By the President of the
United States of America

A Proclamation.

Whereas the Act of Congress making appropriations to supply urgent deficiencies in appropriations for the fiscal year ending June 30, 1918, and prior fiscal years, on account of war expenses and for other purposes, approved March 28, 1918 (Public-No. 109-65th Congress), contains the following provisions:"

(Here is set forth the full text of the Act, as printed above.)

"Now, Therefore, I, Woodrow Wilson,

President of the United States of America, pursuant to the authority vested in me by the said Act of Congress approved March 28, 1918, do hereby determine and declare that the acquisition of title to the foregoing docks, piers, warehouses, wharves, and terminal equipment and facilities, is necessary for the National security and defense and I do hereby take over for the United States of America the immediate possession and title thereof including all leaseholds, easements, rights of way, riparian rights and other rights, estates and interests therein or appurtenant thereto.

Just compensation for the property hereby taken over will be hereafter determined and paid.

In Witness Whereof, etc. * * *"

In the Proclamation of December 3, 1918 the President, after reciting the Act, and the things done by the Proclamation of June 28, continued as follows:

"And Whereas, pursuant to the authority vested in the President by said Act of Congress, approved March 28, 1918, it was in and by said proclamation of June 28, 1918, expressed and declared that just compensation for the property thereby taken over would be thereafter determined and paid;

Now, Therefore, I, Woodrow Wilson, President of the United States of America, pursuant to the authority vested in me by the said Act of Congress, approved March 28, 1918, do hereby determine and declare that the just compensation for the property in and by said proclamation of June 28, 1918, expropriated for the United States of America is the sum of * * * and I do hereby order and direct that compensation for the same * * *

be made out of the money appropriated by the act * * * to the parties and in the amounts set forth in the schedule marked A, hereto annexed; * * *"

In the Schedule this is set forth:

"Schedule of compensation for the docks, piers, warehouses, wharves, and terminal equipment and facilities expropriated by the proclamation of the President on June 28, 1918, pursuant to the Act of Congress, approved March 28, 1918.

* * *

"II. In respect of the following properties:"

(Here follows a description of the premises owned by the North German Lloyd Dock Company and held by appellant under its 999 year lease.)

"To the North German Lloyd Dock Company a corporation of the State of New Jersey, in respect to its reversion, the sum of one dollar ($1.00).

To the North German Lloyd, a corporation of the Free and Hanseatic City of Bremen in the German Empire, $4,831,705 less $47,500, interest paid to the said Prudential Life Insurance Company of America on account of the obligation of said North German Lloyd, namely, four million seven hundred and eighty-four thousand, two hundred five dollars ($4,784,205), to be paid to A. Mitchell Palmer, Alien Property Custodian, appointed under the provisions of the Trading with the Enemy Act, the same to be held by him subject to the provisions of said Act, as directed in the foregoing and annexed proclamation, said sum of $4,784,205 to be chargeable with the payment and satisfaction of all liens, by way of mortgage, judgment or other-

wise, existing on, and all taxes and assessments due and exigible on, the foregoing premises or any part thereof, on the 28th day of June, 1918."

Thus it appears that, by the statute, the President was authorized to "acquire the title" for the United States; and that by the first Proclamation he did so acquire the title. (He also "took over the immediate possession", but that could have had no other purpose or effect than to render regular a possession—possibly thought to have been irregular in its inception—that had already continued for 14 months.) In the second Proclamation he declared that "just compensation for the property *expropriated in and by said Proclamation of June* 28, 1918," was so much, and ordered "compensation for the same" to be made. The Schedule, by its heading, covers compensation for *the property expropriated by the Proclamation of June* 28.

As a Proclamation issued in June, 1918 could hardly "expropriate" a possession dating from April, 1917, and as the award is expressly limited to compensation for "the property in and by said Proclamation of June 28, 1918 expropriated", it seems impossible to hold that the award includes compensation for the use of the property prior to its expropriation. The language of the President's Proclamation of December 3 is a clear expression to the contrary.

Of course the owner is as much entitled to compensation for the deprivation occasioned by a temporary taking for public use as he is for a taking of the fee. *A. W. Duckett & Co., Inc. v. U. S.*, supra; *Hepburn v. Jersey City* (1901) 67 N. J. L. 114 (af-

firmed, Ibid, 686); *Brigham v. Edmands,* 7 Red. (Mass.) 359; *Johnson's Case,* 2 Ct. Cls. 319.

V

So far the argument has proceeded on the theory that there was a taking of such a character as to give rise to a right to be compensated and a right to sue in the Court of Claims, founded upon the Constitution if the rule in *Monongahela Nav. Co. v. U. S.* supra, and *Seaboard Air Line R. Co. v. U. S.,* 261 U. S. 299, is followed; or founded upon the Act of August 29, 1916 (39 Stats. 645) if the rule of *Campbell v. U. S.,* supra, is followed; or founded upon implied contract, if that rule is followed which is laid down in *U. S. v. Great Falls Mfg. Co.,* 112 U. S. 645; *U. S. v. Lynah,* 188 U. S. 445; and *U. S. v. North American Trading & Trans. Co.,* 253 U. S. 330. And it has been assumed that the alien enemy status of the appellant did not deprive it of the benefit of the doctrine enunciated in these cases, for the reason that Congress had evinced no intention of that kind.

In No. 113 an additional basis of liability is asserted, namely, express contract arising from the Memorandum of June 26, 1918, signed in behalf of the United States by a representative of the Alien Property Custodian and by a Lieutenant Colonel of the Army who was one of several gentlemen described in the Memorandum as "comprising the joint Board of the War and Navy Departments". This Memorandum related to an inventory of property respecting which it was "agreed that the North German Lloyd and not the North German Lloyd Dock Company was the owner". It spoke of a part of this as property "for which the Army is considered re-

sponsible, as a result of the selections by the appraisers for the Army in April and May, 1917". Other portions of the property are "recommended to be incorporated as a part of the inventory" of that so selected by the appraisers. With regard to still other property it is said that "to complete the responsibility and record of the Army there was also added for record certain items of office furniture which the Army subsequently acquired from the North German Lloyd". It is said that "the three groups shall be combined, written out, and shall constitute the official inventory and record of all of the movable property of the North German Lloyd in the hands of and chargeable to the War Department at its Hoboken piers on April 17, 1917 * * *". And with regard to certain further property omitted from the record thus made up, it is said that "the Joint Army and Navy Board, hereby decide to recommend to the War Department that the responsibility rests upon the War Department". A supplemental inventory was agreed to be made up.

It is competent for Government to trade and enter into binding contracts with citizens of the enemy. *U. S. v. Lane,* (1869) 8 Wall. 185. A sophist might say that the Memorandum falls short of constituting a contract—that there is a distinction between recognizing "responsibility" or becoming "chargeable" and agreeing to meet the responsibility or the charge. A sophist might have spoken similarly concerning the phrase which this Court, in the *Duckett* case, held to raise "a contract implied in fact". At least, however, it may be said that if the Memorandum falls short of binding the United States in express contract to pay the owner the reasonable value (or the agreed value where value was

agreed upon,) it does warrant the finding of an implied promise; and of course it renders impossible the contention that this personal property was treated by the Government as a war capture or booty.

VI

Except for the fact that the owner was, at the time of the taking, an alien enemy, there could be no doubt of its right to recover compensation and no doubt concerning the jurisdiction of the Court of Claims under Section 145 of the Judicial Code. (36 Stat. 1136).

To affirm the decision of the Court of Claims sustaining the demurrer would, therefore, overrule *Brown v. U. S.*, supra, and be equivalent to a declaration that whenever the United States becomes involved in a war, even though the scene of hostile operations be wholly outside our territory, all property located here and belonging to subjects or citizens of the enemy, becomes liable, not only to be subjected by the United States to temporary public use, involving dispossession of the owner, (No. 112), but also to be taken into the actual ownership of the United States (No. 113), without any right to compensation arising in favor of the owner. It means also that the taking for temporary use, or the divestiture of title, free from obligation to compensate, may be accomplished under the authority of statutes which extend to the property of citizens, although if applied against such property involve an obligation to pay compensation.

The danger of retaliation pointed out by Marshall in the *Brown* case (see foot of p. 128 of 8 Cranch) would thus be incurred, and that not as the result of the act of the legislative branch of the government

which, Marshall says, alone may subject enemy property to treatment different than that accorded the property of citizens; but as the result of judicial decision interpreting in one way as regards citizens' property and in another as regards enemies' property, a statute which on its face purports to create no distinction.

For the reasons stated it is respectfully submitted that the decision of the Court of Claims ought to be reversed and the Record remitted to that Court with instructions to allow these cases to proceed.

If the Government should contend that the Peace Resolution of July 2, 1921 (42 Stats. Part I, 105) or the Treaties of Versailles and Berlin annul rights or bar remedies that appellant might otherwise possess, leave is respectfully prayed to refer to Point V of the Brief in No. 114 for an answer to such contention.

Respectfully submitted,

EDGAR W. HUNT,

Counsel for Appellant.

---

*NOTE:—On pages 2, 14 and 21 of this brief, reference is made to the allusion by the Court of Claims in its memorandum in case No. 112 to 40 Stat. 458. It is believed that the Court below intended to refer to 40 Stat. 459.